DUPLICATE

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

UNITED STATES OF AMERICA Plaintiff, v. CHRISTOPHER P. DROGOUL, Defendant.	:	CRIMINAL ACTION NO. 1:91-CR-078-01-GET

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO PRECLUDE THE GOVERNMENT FROM INTRODUCING CERTAIN STATEMENTS MADE BY DEFENDANT

NOW COMES the United States of America, by and through its undersigned counsel, and respectfully submits this memorandum in opposition to defendant's motion, pursuant to Rule 11(e)(6)[1], Federal Rules of Criminal Procedure, to preclude the government from using certain statements made by or on behalf of the defendant. Drogoul contends that statements made by him to prosecutors and other federal law enforcement officers during debriefing sessions in 1989 and 1992 were part of plea negotiations and, therefore, the government should be precluded from using these statements in any fashion during trial. The defendant's motion is meritless.

INTRODUCTION

On August 4, 1989, a search warrant was executed at the offices of Banca Nazionale del Lavoro's Atlanta Agency ("BNL-Atlanta"). Thereafter, former BNL-Atlanta manager, Christopher

[1] Rule 11(e)(6), Fed. R. Crim. P. is substantially the same rule as Rule 410, Fed. R. Evid.

Drogoul, and his attorneys, requested meetings with BNL bank officials and with United States, State of Georgia, and Italian bank regulators and investors and with law enforcement. Beginning on August 7, 1989, Drogoul participated in eight separate interviews with officials of BNL. The defendant's motion to suppress does not address any of the statements given to bank officials.

On August 10, 1989, the defendant, accompanied by his attorneys, voluntarily participated in the first of five separate interviews by government agents. These discussions were not conducted with a view toward negotiating a plea of guilty by Drogoul. At defendant's insistence, other concerned parties, in addition to his counsel and FBI agents, were in attendance. Subsequent interviews with government agents occurred on August 11, 28, and 31, and on September 11, 1989. In addition, defendant made written and oral presentations to the government through counsel in August, September and November 1989, and in January 1991. All Drogoul's statements were made voluntarily, on advice of counsel after being advised that the statements could be used against him in court.[2]

Drogoul was indicted in February 1991. The defendant's first offer to plead guilty was communicated to the government through

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[2] Drogoul does not claim that any of his statements were made involuntarily or in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 476 (1966).

Drogoul's attorney, Sheila Tyler, in May 1992.[3] Drogoul entered a plea of guilty to sixty counts before Honorable Marvin Shoob on June 2, 1992. Under the terms of the plea agreement, the defendant agreed to cooperate with the government and to be debriefed by government agents. Thereafter, the defendant was interviewed during 28 separate debriefing sessions. Reports and memoranda were prepared by the agents in relation to each of the interviews. A sentencing hearing began in September 1992 before Judge Shoob during which the defendant moved to withdraw his plea of guilty. Drogoul, who was represented by Bobby Lee Cook, voluntarily testified at the hearing. At the conclusion of the hearing, Judge Shoob granted the defendant's motion to withdraw his plea.

DISCUSSION

I. THE 1989 STATEMENTS WERE NOT THE PRODUCT OF PLEA NEGOTIATIONS.

A. The 1989 Statements

All of Drogoul's 1989 statements, oral and written, were provided voluntarily. Some statements were furnished by his counsel with Drogoul's express approval. None of the statements were the product of plea negotiations with the government. The accompanying Notice of Intention to Use Evidence contains a complete listing of all the statements. The 1989 statements fall into six categories:

1. **Statements made during interviews with officials of BNL.** These interviews occurred on August 7, 8, 14, 15, 16, 18, 21, and 24, 1989. No government agents attended these

[3] In a letter dated May 15, 1992, Drogoul proposed a plea of guilty to thirty counts of the pending 347-count indictment.

meetings. Minutes of the meetings were prepared which set forth Drogoul's statements to the bank officials.[4]

2. **Statements made during interviews with government agents.** These interviews occurred on August 10, 11, and 28, and on September 11, 1989. Official reports of the interviews were prepared including FBI 302's and IRS Memoranda of Interviews.

3. **Memorandum to the File, September, 1989.** This 122-page memorandum was prepared by Drogoul at the request of his attorneys at Arnall Golden and Gregory, in answer to specific questions propounded by the government. The attorney-client privilege has been waived.
   a. **September 8, 1989, meeting with government agents.** To review points contained in Drogoul's memorandum.
   b. **September 11, 1989, meeting with government agents.** To review points contained in Drogoul's memorandum.

4. **An outline of "Oral Commitments" in Drogoul's handwriting.** This outline lists well over $100 million in unwritten commitments to fund trade with Iraq and other countries.

5. **Letters from Attorney Lackland, authorized by Drogoul.** These letters are dated September 15 and 21, 1989 and November 3, 1989.

6. **Drogoul's statements to his attorneys at Williams & Connolly.** These statements were provided to the government with Drogoul's approval and the attorney-client privilege has been waived. Although the FBI obtained the information from Williams & Connally attorneys in 1992, Drogoul had made the statements during their earlier representation of him.

Drogoul does not contest the admissibility of statments made during interviews with officials of BNL, the letters from Attorney Lackland or statements made to his attorneys at Williams & Connolly. He argues that all of his other 1989 statements should be suppressed because they were made in anticipation of a plea of

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[4] Drogoul's statements to BNL officials are not addressed by his motion to suppress.

guilty. The Federal Rules, however, limit the admissibility only of:

> (A) a plea of guilty which was later withdrawn;
> (B) a plea of nolo contendere;
> (C) any statement made in the course of proceedings under [Fed. R. Crim. P. 11] regarding either of the foregoing pleas; or
> (D) any statements made in the course of plea discussions with an attorney for the government which ... result in a plea of guilty later withdrawn.

Fed. R. Crim. P. 11(e)(6); Fed. R. Evid. 410. This rule does not reach every statement made by a target of an investigation seeking to curry favor with the government. Rather, as the old Fifth Circuit held in United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978)(en banc), the record must establish that "the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion" and that "the accused's expectation was reasonable given the totality of the objective circumstances." Id. at 1366.

Here the record demonstrates the contrary. Evidence presented at a hearing conducted on April 27, 1992, after which this court rejected the defendant's motion to exclude the 1989 statements based on ineffectiveness of his former counsel,[5] shows that Drogoul never expressed an intention to plead guilty, and that he neither sought nor was promised any specific concession for the statements he was making. As explained below, his belated claim that the 1989

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[5] At the conclusion of the hearing Judge Shoob not only denied the motion but described the allegations as "totally without foundation" and "irresponsible." (Tr. April 27, 1992 at 126.)

statements were made in the course of plea discussions is totally without foundation.

B. The Previous Motion to Suppress

Drogoul's former counsel, Mr. Theodore Lackland, testified that he first met Drogoul on August 8, 1989, after Drogoul already had met with officials of BNL. Drogoul met with officials at BNL/New York on August 7, 1989, upon his return to the United States. Drogoul returned to Atlanta on August 8, 1989, and met with officials at BNL/Atlanta. On both occasions, Drogoul admitted that he had conducted his off-book activities without authorization from anyone. Thus, Drogoul had already decided to cooperate with the bank, stating that it was his "moral obligation" to do so. (Minutes of meeting at BNL Atlanta, August 8, 1989.) Drogoul's lawyers recognized his two previous statements as damaging admissions which would be used against him. His further cooperation with the government and the bank, therefore, was a strategic decision calculated to obtain lenient treatment for their client in the future. There was no misunderstanding, however, that everything Drogoul said would be admissible against him in court.[6]

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[6] Drogoul's first interview with government agents was on August 10, 1989. Although the interview was not custodial, Drogoul was advised of his Miranda rights twice; once by S/A Kingston (Tr. April 27, 1992 at 16) and again by S/A Hardy (Tr. April 27, 1992 at 36). Both agents made it clear to Drogoul that anything he said could or would be used against him. At the August 28, 1989, interview, the agents again advised Drogoul of his rights and executed a waiver of rights form which Drogoul signed. (Tr. April 27, 1992 at 42.) It is important to note as well that Drogoul was accompanied by his lawyers at all times.

On cross-examination by Public Defender Sheila Tyler, Mr. Lackland testified:

> We made an assessment of the situation, an assessment of the conversations he had already had with the bank, what he had already said, and felt that it was in his best interest to share that information with the government.
>
> Q. Sir, did you advise Mr. Drogoul during those hours of questioning that he had a right to remain silent?
>
> A. Yes; we did.
>
> * * *
>
> Q. What did you tell him?
>
> A. We told him that the information would be used against him, if he was not accurate and candid in what he said, if he was not completely truthful, if he was found to be lying, that it would work against his best interest.

(Tr. April 27, 1992, at 110-111.) Lackland further testified that Drogoul was advised that he could spend over a hundred years in jail if he was convicted of the crimes alleged. This further contributed to their decision to advise Drogoul to cooperate with the government. (Tr. April 27, 1992, at 111-112.)

Upon further questioning by Judge Shoob, Mr. Lackland testified as follows:

> The Court: . . . Did you advise him of his exposure -- . . . --in volunteering this information to you -- ... -- and to the government?
>
> A. Yes; we did.
>
> By Ms. Tyler:
>
> Q. What did you say to him?
>
> A. . . . [W]e did tell him that the government had certain allegations, that they apparently had interviewed all the people at the bank, . . . [who] had made allegations about his conduct, that they had certain

documents at the bank which would appear to have been incriminating, that he could attempt to explain these things; if he could explain them, it might minimize the risk. If he could not explain them or chose not to explain them, then the documents will speak for themselves.

(Tr. April 27, 1992, at 112-113.)

During questioning by the government, Mr. Lackland explained that the dangers of this approach were carefully discussed with Drogoul. His further cooperation seemed sensible, however, in view of the amount of evidence against him and the fact that he had already given statements to the bank.

Q. Did you, in fact, advise him that it may not be such a wise idea to do so?

A. Our initial conversation was along those lines, and during that conversation Allen Hirsch and Ms. Pappas were also present, and we weighed the pros and cons of his saying something as opposed to not saying something, and we certainly took into account he had already made statements to the bank and that those statements had undoubtedly, by that time, made their way back to the F.B.I.

(Tr. April 27, 1992, at 124.)

Attorney Allen Hirsch also testified that the defense strategy was based upon the amount of incriminating evidence against their client.

We were presented with a great deal of documentation, a rather substantial paper trail. Mr. Drogoul was very anxious to speak to the authorities. In fact, before we were retained he had, in fact, spoken to bank officials.

(Tr. April 27, 1992, at 131.) At a later point, Mr. Hirsch commented further:

The case on paper looked very, very serious against Mr. Drogoul. The only opportunity to overcome what was a very serious paper case was to explain what was going on and what was happening.

(Tr. April 27, 1992, at 134.) Obviously, this decision was not taken lightly by the two attorneys who explained the approach to their client. Mr. Hirsch described their decision as follows:

> We believed that, from what was explained to us by Mr. Drogoul, from our review of the documents, that Mr. Drogoul was a very, very small fish in a very, very large pond. We believed that meeting with the government opened the opportunity to have this handled as a regulatory matter. We believed that meeting with the government could greatly enhance Mr. Drogoul's opportunity to be handled in a much more lenient fashion concerning all the circumstances.
>
> We however, advised him what the potential was, what the light most favorable and light least favorable was to him, and, after many hours of deliberation and discussions with him, Mr. Lackland and myself decided our best avenue was to meet with the government.

(Tr. April 27, 1992, at 132.)

During questioning by Ms. Tyler, Mr. Lackland explained Drogoul's desire to clear the record, protect his employees and attempt to show that this was nothing more than "regulatory violations:"

> Q. But, given all this information, Mr. Drogoul agreed to answer these questions anyway?
>
> A. Mr. Drogoul had, at the time he came back from New York, I mean from Paris, came back with the intent of clearing the record so that his employees would not be unfairly blamed and that he could put this matter into perspective, and, from the perspective we were approaching, this was a matter of regulatory violation, and, if we could prove it was a matter of regulatory violation, that we would feel comfortable that we had done a service for Mr. Drogoul.

(Tr. April 27, 1992, at 118.)

Thus, the approach taken by Drogoul and his lawyers was a strategic decision and <u>not</u> plea negotiation. Mr. Lackland stated:

> Q. So would it be fair to characterize your action as a strategic decision to go forward and have Mr. Drogoul come and give his statements?
>
> A. Yes. It was consistent with what he intended to do and what he requested we do in his behalf.

(Tr. April 27, 1992, at 125.)

There can be no doubt that Mr. Drogoul himself was quite eager to tell his story to all who would listen. S/A John Kingston, FBI, described Drogoul as "anxious" to explain the situation during the initial interview on August 10, 1989. (Tr. April 27, 1992 at 17, 18, 21, 25 and 26.) It should be noted that Drogoul's initial interview with the government on August 10 was after he had given two statements to officials at BNL and after over 20 hours of defense strategy discussions with his lawyers. (Tr. April 27, 1992 at 108-109.) Attorney P. Bruce Kirwan, who also testified at the hearing, described Drogoul as "very eager" to talk to the BNL officials in Atlanta on August 8. (Tr. April 27, 1992 at 76.) Moreover, it was Drogoul's idea to talk to all the government agencies at once to "put the record straight" during the meetings on August 10 and 11. (Tr. April 27, 1992 at 78.)

The testimony received at the hearing also established that there were no plea offers or promises of immunity from the government in return for Drogoul's cooperation. Even Ms. Tyler herself admitted at the outset that there was no deal:

> There's no deal in this case. At the time that Mr. Lackland presented Mr. Drogoul to the government he did not have any grant of immunity. To my knowledge there was no deal.

(Tr. April 27, 1992 at 10-11, emphasis added) Mr. Lackland also

denied that there was any deal with the government for Drogoul's cooperation. Although Mr. Lackland did have a discussion with AUSA Gale McKenzie about the possibility of five false statement counts, he was clear that there were no promises from the government. (Tr. April 27, 1992 at 115.) Later, during cross-examination, Mr. Lackland stated that AUSA McKenzie never made such an offer.

> Q. Ms. McKenzie never offered, specifically offered, you five counts?
>
> A. That's correct; that's true.

(Tr. April 27, 1992 at 123.) Mr. Hirsch also testified that the government promised Drogoul nothing in exchange for his cooperation.

> Q. Did the government -- What, if anything, did the government promise Mr. Drogoul in exchange for this information?
>
> A. The government promised him nothing.
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> * * *
>
> Q. Again, are you saying that this information was given to the government without any type of immunity or deal; is that correct?
>
> A. That is correct.

(Tr. April 27, 1992 at 140-141.)

Once again, during her summation for the court, Ms. Tyler asserted her "ineffective assistance" claim because, she stated, Drogoul's previous counsel "gave Mr. Drogoul to the government on a silver platter. <u>There were no deals</u>." (Tr. April 27, 1992 at 159, emphasis added.)

Based upon the foregoing, the transcript of the April 27, 1992, testimony establishes five important points. First, there were no deals or promises from the government which induced Drogoul's cooperation. Second, Drogoul knew he had the right to remain silent and all statements would be used against him. Third, Drogoul never sought any specific concessions from the government in exchange for his cooperation. Fourth, Drogoul never expressed an intention to plead guilty to any charge in exchange for more lenient treatment by the government. Fifth, and most important, Drogoul's decision to cooperate was a knowing and calculated defense strategy, on advice of competent counsel, designed to put him in the best possible position to receive lenient treatment in the future. Under these circumstances, Drogoul's belated claim that his cooperation was an attempt to negotiate a plea, asserted some three years and ten months after his first meeting with government agents, is totally without foundation. The motion to suppress, therefore, should be denied.

C. The Application of Rule 11(e)(6)

In United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978)(en banc), the Fifth Circuit established a two-tiered analysis for determining whether a conversation is a plea negotiation and, therefore, inadmissible under Rule 11(e)(6), Fed. R. Crim. P., and Rule 410, Fed. R. Evid.[7] According to Robertson, the trial court must determine the following:

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[7] In his memorandum, the defendant recognizes Robertson as the seminal case in this jurisdiction regarding Rule 11(e)(6), Fed. R. Crim. P. Def. Mem. at 12.

> ... first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and second, whether the accused's expectation was reasonable given the totality of the objective circumstances.

Robertson, 582 F.2d at 1366.

With respect to the initial inquiry into the accused's state of mind, the Court noted that, in those cases in which there is not a clear expression of subjective intent by the accused to pursue plea negotiations, then the accused's after-the-fact assertion that he intended to negotiate a plea is viewed with skepticism. The objective record must establish that the accused's statements were made in a reasonable belief that he was negotiating a plea agreement. Id. at 1367.[8]

Significantly, the Court drew a distinction between offers to do something in furtherance of a negotiated plea, which are inadmissible, and independent admissions of fact, which may be admitted. The Court offered the following guidance:

> A confession only relates a set of facts, and therefore, requires only a knowledge of the factual situation. A guilty plea is something more; it is an admission of all the elements of the crime charged. (citation omitted) While all guilty pleas are confessions, not all confessions are guilty pleas. Therefore, it follows that not all confessions are plea negotiations.

Id. at 1368. Thus, confessions or admissions which are either made in the absence of plea negotiations or wholly independent from any plea negotiations are still admissible. Accordingly, if a

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[8] The Court noted that this two-tiered inquiry was analogous to the judicial skepticism accorded after-the-fact assertion by an accused who claims to have misunderstood the specific terms of a plea agreement. Id.

person who has been fully advised of his rights makes an admission to a law enforcement officer, such a statement is admissible despite the fact that the accused makes some request of those in charge. "Such a request, without more, does not transform a confession into a plea negotiation." Id.

Applying this analysis to the facts in Robertson, the Court found that the conversation between the defendants and law enforcement agents was not an inadmissible plea negotiation. Id. In Robertson, the defendants initiated a discussion in the parking lot with drug enforcement agents after their arrest, offering to confess in exchange for leniency for the two women who had been arrested with them. The agents told the defendants that they had no authority to release the women, but agreed to inform judicial authorities of defendants' cooperation.

The court reasoned that, assuming the defendants were bargaining for a government concession (the immediate release of the women) and received a government concession (notification of their cooperation to judicial authorities), the essential quid of a plea negotiation quid pro quo was missing. The only concession which the defendants offered and which the government received was a confession. The court reasoned that the defendants did not contemplate entering a plea of guilty to obtain the release of the women. Accordingly, "[a] bargained confession without more, is not a plea negotiation." Id. at 1369.

Emphasizing that there is no requirement of any formal expression of intent to enter plea negotiations by a defendant, the

court focused its inquiry on the objective circumstances in determining whether the defendant here reasonably had such an intent. Id. The court noted that the accused instigated the parking lot conversation when he told the agent that he wanted to cooperate by telling all if he could expect to get his wife off. Knowing that what he said would be brought to the attention of judicial authorities, the accused detailed their involvement in order to exonerate the women. The court noted that the men did not enter a guilty plea or even offer to plead guilty in order to negotiate a concession from the government. Id. at 1369-70. Thus, the statements made by the accused in Robertson are "reliable, probative and constitutionally admissible for the jury's consideration." Id. at 1370.

Just as in Robertson, the record surrounding Drogoul's 1989 statements to the government does not establish that his statements were made in a reasonable belief that he was negotiating a plea agreement. Indeed, the record adduced before Judge Shoob in the previous motion to suppress demonstrates quite the opposite. Drogoul never offered to plead guilty in exchange for his cooperation. There were no promises from the government to induce his cooperation. He was explicitly informed by his lawyers and government agents that his statements could be used against him. The record is clear that Drogoul's cooperation was the product, not of plea negotiations, but of a calculated defense strategy as described in the testimony of two of his lawyers.

In the instant case, the defendant fails to meet either prong of the two-tiered analysis established by Robertson. First, it is clear that, during the 1989 debriefings, Drogoul never exhibited an actual subjective intent to negotiate a plea. Certainly Drogoul never offered to plead guilty in exchange for any government concession.[9] The record adduced before Judge Shoob directly contradicts the claim that Drogoul had an actual subjective intent to plead guilty. His attorney at the hearing, Sheila Tyler, stated categorically that there were no deals. The motion to suppress was not based upon Rule 11(e)(6). Moreover, Drogoul's lawyers at the time of the statements testified that Drogoul's cooperation was the product of a calculated defense strategy; not of plea negotiations. Under these circumstances, Drogoul's belated claim of an expectation to plea bargain is unreasonable and incredible. Therefore, in the absence of any manifestation of intent to pursue plea negotiations, the Robertson analysis need go no further.[10]

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[9] For this reason, the defendant's reliance upon United States v. Herman, 544 F.2d 791 (5th Cir. 1977) is misplaced. In Herman, the defendant expressly offered to plead guilty to robbery charges and produce the gun if authorities would agree to drop the accompanying murder charges. Herman's subsequent statements therefore were found to be inadmissible because they were made in connection with an offer to plead guilty under Rule 11(e)(6), Fed. R. Crim. P. The Robertson court distinguished Herman on this basis. Robertson, 582 F.2d at 1367. In this case, as in Robertson, the defendant made no offer to plead guilty.

[10] Defendant notes that under United States v. Geders, 566 F.2d 1227 (5th Cir. 1978), the absence of an express plea offer from the defendant is not dispositive. As Robertson makes clear, however, the absence of such an offer is a major factor to be considered by the court in assessing the defendant's subjective intentions. A defendant's after-the-fact assertion, therefore, is to be viewed with skepticism. Robertson, 582 F.2d at 1367.

Even if we proceed to the second prong of Robertson, Drogoul's claim fares no better. Here, as in Robertson, the defendant's assertion of a subjective desire to negotiate a plea comes after the fact. Thus, the court must carefully evaluate the record to determine whether the defendant reasonably had such an intent, considering all the objective circumstances. See Robertson, 582 F.2d at 1369. It should be noted that Drogoul's claim comes three years and ten months after he voluntarily provided statements to government agents. Moreover, the testimony of Drogoul's own lawyers at the previous suppression hearing is sufficient to belie his present claim.

Similar to the accused in Robertson, Drogoul instigated the discussions with officials at BNL and law enforcement officials in the hope that his cooperation would be made known to the court. There is no evidence, however, to suggest that Drogoul expected to negotiate a plea in that context. The essential quid of a plea negotiation quid pro quo was missing. The only concessions which Drogoul offered and which the government received were his statements. The excerpt from Agent Hardy's 302, quoted by defendant in his motion to suppress, corroborates these facts. Drogoul's cooperation was to be made known to the court if a plea were entered in this case. No promises were made to Drogoul or his attorneys with regard to his cooperation, however. Def. Mot. at 4.

The defendant asserts that the government made a valid offer for a plea through Assistant United States Attorney Gale McKenzie. There is no basis for that contention. As set forth above,

Attorneys Lackland and Hirsch testified that no offer was made by AUSA McKenzie. Not only was there no offer to plead guilty from Drogoul, but no consideration was offered from the government either.

Quite simply, the extensive record in this case does not support Drogoul's belated claim that his statements were the product of plea negotiations. Rather, Drogoul's cooperation was the product of a calculated defense strategy to earn more lenient treatment in the future. As the Robertson court observed:

> It is reasonable to assume that the cooperation of an arrested person often is prompted by a desire for leniency for himself or others. Statements or confessions made in such circumstances, if they are voluntary and made with full awareness of the person's rights, are reliable, probative and constitutionally admissible evidence.

Robertson, 582 F.2d at 1368. Therefore, Drogoul's statements made in 1989 are admissible evidence. His motion to suppress should be denied.

D. Waiver of the Attorney-Client Privilege

Some of Drogoul's statements were given by him to his lawyers who, in turn, provided them to the government with Drogoul's knowledge and approval.[11] Drogoul's earlier motion to suppress addressed these vicarious admissions as well as Drogoul's direct admissions to government agents discussed above. The motion alleged ineffective assistance of counsel on the part of attorneys at Arnall Golden & Gregory. In order for Drogoul to pursue the

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[11] Of course, no question of privilege arises with regard to Drogoul's voluntary statements to BNL officials or to government agents.

motion on those grounds, it was necessary for him to specifically waive his attorney-client privilege. In each case, therefore, the attorney-client privilege has been waived.

Attorney Sheila Tyler filed the motion to suppress in March 1992. In response, the government filed a motion before the United States Magistrate Judge to determine whether the attorney-client privilege had been waived. In an order dated April 2, 1992, Judge John E. Dougherty, United States Magistrate Judge, found that Drogoul had waived any privilege with regard to the representation provided by Arnall Golden & Gregory attorneys.[12] Further, at the hearing on the motion before Judge Shoob, the court questioned Drogoul personally and obtained his express waiver of any privilege associated with his previous attorneys. (Tr. April 27, 1992 at 12.)[13] Finally, after Drogoul's plea of guilty, he executed a written waiver of any attorney-client privilege, which was also signed by Sheila Tyler.[14]

In August 1989 Drogoul prepared a handwritten document entitled "Oral Commitments" in response to the government's concern that unwritten "off-book" commitments for BNL funding of credit transactions were outstanding. This document was delivered to the

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[12] The order is not docketed in the clerk's file of this case.

[13] Judge Shoob reaffirmed the finding of waiver at a hearing after the plea of guilty was entered. (Tr. July 7, 1992 at 59.)

[14] The waiver states, "... Drogoul hereby waives any and all privileges possessed by him, including the attorney client privilege and the work product protection with respect to all documents and other information existing and communications made as of June 8, 1992, as it relates to his representation by the law firms of Arnold, Golden & Gregory, and Williams & Conally. [sic]

government by Mr. Lackland with the full knowledge and approval of Drogoul.

Attorney Lackland also communicated information from Drogoul to the government in the form of letters. Three letters were sent dated September 15 and 21, and November 3, 1989. At the hearing on the earlier motion to suppress, Mr. Lackland testified concerning the letters as follows:

> Q. Sir, you also sent letters to Ms. McKenzie, did you not?
> A. Yes; I did.
> Q. And these letters included information that you received from Mr. Drogoul?
> A. Yes; it did.
> Q. Did you tell Mr. Drogoul you were going to provide this information to the government?
> A. Mr. Drogoul assisted me in drafting the letters, and he reviewed them before I signed them.

(Tr. April 27, 1992 at 120-121.) Therefore, Mr. Lackland left no doubt that these vicarious admissions were made with the full knowledge and approval of Drogoul. Since there is no issue of attorney-client privilege and the admissions were made voluntarily, the letters and the "Oral Commitments" document are admissible.

In September 1989, Drogoul prepared the Memorandum to File for his attorneys at Arnall Golden & Gregory. The 122-page memorandum addressed 41 separate subject areas relating to BNL and the unauthorized loans, extensions of credit and "off-book" transactions. It was prepared to answer specific questions posed by the government during the time Drogoul was making statements to the government, about one month after the search. On September 8 and 11, 1989, Drogoul's lawyers met with government agents at the

U.S. Attorney's Office to communicate the contents of the memorandum in answer to the agents' questions.

It was clear that Drogoul intended the contents of the memorandum to be revealed to the agents through his lawyers. Mr. Lackland had the 122-page memorandum in his possession during the two meetings with government agents and communicated its contents to them.[15] This was done with Drogoul's knowledge and approval. In fact, Drogoul waited at the offices of Arnall Golden & Gregory to answer questions by phone if necessary. On September 11, 1989, after the meeting with the agents, Drogoul's attorneys brought an IRS Special Agent back to the office to meet with Drogoul and clarify his answers.

All of Drogoul's 1989 statements, oral or written, direct or vicarious, by letter or by memo, were the subject of the previous motion to suppress which was denied by Judge Shoob. No claim of involuntariness was or has been asserted. The attorney-client privilege has been waived. The issue of ineffective assistance of counsel has been resolved. It is clear from the foregoing discussion that none of the statements were made during plea negotiations. Therefore, all of Drogoul's 1989 statements should be admissible in the government's case-in-chief.

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[15] Although the memorandum was voluntarily prepared for the government in 1989, and the attorney-client privilege had been waived, a physical copy of the memorandum itself was not furnished to the government until June 1992. Clearly, this memorandum does not fall within the exclusion of Rule 11(e)(6) because it was not furnished during plea negotiations. Moreover, the plea agreement does not exclude use of the memorandum because it was not part of the debriefing process.

II. THE GOVERNMENT AGREES THAT DEFENDANT'S PROFFER DURING PLEA NEGOTIATIONS, HIS PLEA OF GUILTY AND GOVERNMENT DEBRIEFINGS ARE INADMISSIBLE IN THE GOVERNMENT'S CASE-IN-CHIEF. HOWEVER, ALL OTHER 1992 STATEMENTS ARE ADMISSIBLE.

A. The 1992 Statements

Once again, all of Drogoul's 1992 statements, whether during testimony or debriefing by government agents were provided voluntarily. Drogoul's 1992 statements fall into five basic categories:[16]

1. **A "Proffer" submitted by Sheila Tyler during plea discussions with attorneys for the government.** This handwritten document sets forth the substance of Drogoul's statement if he were to cooperate with the government.

2. **Drogoul's sworn statement before the court during the plea of guilty on June 2, 1992.** This includes the plea colloquy with Judge Shoob conducted pursuant to Rule 11(d), Fed. R. Crim. P.

3. **Debriefings with government agents.** There were 28 debriefing sessions from June 4 through August 20, 1992.[17]

4. **The "Origins of BNL" and Drogoul's testimony at the sentencing hearing.** Drogoul began, but did not finish, a written statement to make a full disclosure at the time of his plea. The "Origins of BNL" was provided to the government <u>after</u> the plea in June 1992. Drogoul voluntarily took the stand during the sentencing hearing before Judge Shoob and testified on September 29-30, 1992.

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[16] All of the following have been provided to defendant in discovery pursuant to Rule 16, Fed. R. Crim. P.

[17] Drogoul created the wall of "post-it" notes during the debriefing sessions to explain his activities in chronological order. These notes have been preserved and are available for inspection at the BNL Task Force office.

5. **Public statements to the news media and others.**[18] Since his indictment, the defendant has given several interviews with various news media, which have appeared in newspapers throughout the world, including statements made to representatives of the Italian Senate Parliamentary Committee and to Il Manifesto. In addition, the defendant has been interviewed by Gentleman's Quarterly and has appeared twice on CBS News' "60 Minutes."

B. Plea Negotiations and Entry of the Plea

First, it is important to note that until May 1992 Drogoul had never offered to plead guilty. The government was not interested in any plea agreement which did not include the defendant's full cooperation. It was clear at the May 11 hearing before Judge Shoob (a portion of which is set forth in defendant's memorandum) that Drogoul simply was not willing to provide cooperation with the government as part of a plea agreement.

Correspondence was exchanged between the government and Ms. Sheila Tyler, attorney for Drogoul, between May 15 and May 29, 1992. On May 15, 1992, Ms. Tyler told the government that Drogoul was willing to plead guilty to thirty counts, but without cooperation by Drogoul. On May 16, 1992, the government responded with a counter-offer under which Drogoul would plead guilty to sixty counts and provide full cooperation to the government.[19]

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[18] The defendant's motion to suppress does not address any public statements made by Drogoul.

[19] This proposal included full debriefing of Drogoul by government agents. Also, Drogoul was to be questioned by attorneys for both sides before a court reporter, under oath, to avoid any misunderstandings of his position on any matter. The letter further stated: "There will be unrestricted use by you and by the government of both the debriefing and the sworn statement." A footnote to this sentence stated: "Except the government will commit not to use any statements in its case-in-chief against Mr.

This offer was rejected by Drogoul in a letter from Ms. Tyler dated May 26, 1992, in which she announced Drogoul's intention to plead guilty to the entire indictment but without cooperation with the government. On May 28, 1992, the government wrote Ms. Tyler that it was still interested in obtaining Drogoul's cooperation and would review any proffer he wished to make. Obviously, there still was no plea agreement.

Thereafter, Ms. Tyler submitted a "Proffer" in her own handwriting to the government. Further discussions occurred during which it was decided that Drogoul would plead guilty to sixty counts of the indictment and cooperate fully with the government. This plea was entered before Judge Shoob on June 2, 1992. The government agrees that Rule 11(e)(6) applies to exclude the correspondence and the "Proffer" submitted by Ms. Tyler. No attempt will be made to use this material in the government's case-in-chief.

Drogoul entered his plea of guilty before Judge Shoob in open court during which the court questioned the defendant under oath. The government agrees that the plea colloquy with the court is inadmissible in the government's case-in-chief or in cross-examination of the defendant. See United States v. Martinez, 536 F.2d 1107 (5th Cir. 1976).

C. Statements After the Plea

Pursuant to the plea agreement, the defendant was debriefed by

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Drogoul if the plea should be voided prior to sentencing and he should then elect to proceed to trial."

government agents on 28 occasions from June 4 through August 20, 1992. The contents of Drogoul's statements are set forth in reports prepared by the government agents.[20]

1. Debriefing Statements

The admissibility of the debriefing statements is governed by the provisions of the plea agreement. The plea agreement provides:

> There can be unrestricted use by the government and the defense of both the debriefing and the sworn statement, except the government agrees not use [sic] any such statements in its case-in-chief against the defendant if the plea should be voided prior to sentencing and he should then elect to go to trial.

(Plea agreement at p. 2, emphasis added) Therefore, the government has agreed not to use the debriefing statements in its case-in-chief against the defendant. The term "unrestricted use," however, means use for any other purpose, including the impeachment of the defendant if he chooses to testify at trial or for introduction during the government's case in rebuttal.[21]

2. "Origins of BNL"

Judge Shoob expected Drogoul to make a "full disclosure" at the time of his plea. Sheila Tyler had promised Judge Shoob, apparently in an ex parte communication, that Drogoul would deliver

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[20] All FBI 302's and USDA Memoranda of Interviews concerning Drogoul's statements have been furnished to the defendant in discovery pursuant to Rule 16, Fed. R. Crim. P.

[21] It should be noted that Rule 806, Fed. R. Evid., would permit the impeachment of the defendant as a hearsay declarant in the government's case-in chief, as if Drogoul had testified. If defense counsel elicits prior hearsay statements made by Drogoul to another witness, the government may proceed to introduce inconsistent statements, including the debriefing statements or any other statement. See United States v. Waugneaux, 683 F.2d 1343 (11th Cir. 1982).

a statement in court.[22] Drogoul informed the court that he "started to write it," but "as [he] became involved in the plea negotiations, [he] stopped writing." (Tr. June 2, 1992 at 57-78). Drogoul stated that the statement was about 15 percent completed. (Id. at 65).

The government did not know that Drogoul was preparing the statement nor did the government suggest that he discontinue writing it. This 22-page typewritten statement entitled "Origins of BNL" was submitted to the government on June 8, 1992. This document was not part of the government's debriefing sessions with Drogoul. Therefore, the terms of the plea agreement excluding the "debriefing" from the government's case-in-chief do not apply to the "Origins of BNL."

3. Drogoul's Testimony at the Sentencing Hearing

The defendant chose to testify at his sentencing hearing before Judge Shoob on September 29-30, 1992. Neither Rule 11(e)(6) nor the plea agreement renders this testimony inadmissible against Drogoul at trial. Therefore, it is admissible against Drogoul in the government's case-in-chief.

In United States v. Knight, 867 F.2d 1285 (11th Cir. 1989), cert. denied, 493 U.S. 846 (1989), the Eleventh Circuit held that once a plea agreement is reached, any statement made thereafter is

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[22] "The Court: Well, you have had about three to four weeks to prepare the written statement that was supposed to be submitted today. Your attorney was very careful to obtain a promise from the Court that you would either be permitted to testify orally or that you could testify by reviewing your notes or by reading your notes, and I informed her that you could do any of the three or a combination of the three . . . ." (Tr. June 2, 1992 at 77).

not part of "plea negotiations" within the the scope of Rule 11(e)(6). The government offered to allow the defendant to plead guilty to one count in exchange for the defendant's truthful cooperation. The defendant accepted the offer and began to answer questions. The court cited the Robertson case in defining the scope of "plea negotiations:"

> . . . suppressing the evidence of plea negotiations serves the policy of insuring a free dialogue "only when the accused and the government actually engage in plea negotiations: 'discussions in advance of the time for pleading *with a view to an agreement* whereby the defendant will enter a plea in the hope of receiving certain charge or sentence concessions.'" *United States v. Robertson*, 582 F.2d 1356, 1365 (5th Cir. 1978).

Knight, 867 F.2d at 1288. Therefore, when the defendant in Knight, accepted the plea offer, her discussions with the government agent were "no longer with a view to an agreement; the negotiations had ended and a plea contract was formed." Id. The court reasoned that "[o]nce a plea contract is formed, the policy behind Rule 11(e)(6)--to allow a defendant to freely negotiate without fear that statements will be used against him--is no longer applicable." Id. Thus, Rule 11(e)(6) does not apply after the plea agreement is reached.

> The point of plea negotiations had passed once [the defendant] accepted the plea offer. Exclusion of statements made once that point is passed would not serve the policy underlying Rule 11(e)(6), and the rule of exclusion therefore no longer applies.

Id. Therefore, any statements made by Drogoul after his plea was

finalized are admissible.[13]

Likewise, in United States v. Davis, 617 F.2d 677 (D.C. Cir. 1979), the court ruled that grand jury testimony by a defendant after formalization of his plea agreement is admissible against him at trial. In Davis, the defendant testified before a grand jury after the plea agreement had been reached. The defendant later withdrew from the agreement and pleaded not guilty. The court held that ". . . for purposes of rule [sic] 11(e)(6) statements made by a defendant in testimony before a grand jury pursuant to a plea agreement are not 'statements made in connection with, and relevant to' plea negotiations, offers of pleas, or pleas entered and later withdrawn." Id. at 686. The Davis court outlined the policy reasons behind its decision:

> Excluding testimony made after--and pursuant to--the agreement would not serve the purpose of encouraging compromise. Indeed, such a rule would permit a defendant to breach his bargain with impunity: he could renounce the agreement and return to the status quo ante whenever he chose, even though the Government has no parallel power to rescind the compromise unilaterally. * * * The drafters of rule 11(e)(6) could not have contemplated such a result.

Id. at 685.[14]

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[13] In this case, even Drogoul's statements during government debriefings would be admissible in the government's case-in-chief but for the provision of the plea agreement cited above. The plea agreement is silent, however, concerning Drogoul's testimony at the sentencing hearing.

[14] The quotations from Davis selected by Drogoul in his memorandum are misleading on this point. (Def. Mem. at 18). The first quotation refers to statements made during proceedings under Rule 11, i.e., the plea colloquy before the court. Davis, 617 F.2d at 684. The second quotation is taken out of the context provided by the court in the following sentence which was omitted in defendant's memorandum: "By contrast, excluding grand jury

In this case, Drogoul's plea agreement had been reached and his plea of guilty had been entered as of June 2, 1992. Drogoul then testified voluntarily at his sentencing hearing, after which his motion to withdraw his plea was granted. Drogoul wants just what the Davis court said he cannot have: renunciation of the bargain with impunity. Therefore, Drogoul's sentencing hearing testimony is outside the scope of Rule 11(e)(6) and is admissible against him at trial.

Finally, any statement made during interviews with the news media are admissible against the defendant for any purpose. All such statements were voluntarily made and no rule of exclusion applies.

III. IF DROGOUL CHOOSES TO TESTIFY AT TRIAL, HE MAY BE IMPEACHED WITH ANY OF HIS PRIOR INCONSISTENT STATEMENTS EXCEPT THOSE EXCLUDED BY 11(e)(6).

First, as argued above, none of Drogoul's 1989 statements are within the scope of plea negotiations under Rule 11(e)(6). That is, none of the 1989 statements are inadmissible statements made "in connection with" plea negotiations. This is because Drogoul never made an offer to plead guilty until May 1992. Therefore, Drogoul's 1989 statements are admissible for any purpose, including the impeachment of Drogoul if he chooses to testify at trial.

Second, with regard to Drogoul's 1992 statements, Rule 11(e)(6) applies only to the negotiations preceding and the hearing

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testimony simply because the defendant later 'wants out' of his plea agreement presents a far different situation." Id. at 686.

to receive Drogoul's guilty plea entered on June 2, 1992.[15] After the guilty plea was entered, the Knight "bright line" was drawn. As noted above, all statements of the defendant in Knight made immediately after her acceptance of the plea offer were found admissible. Knight, 867 F.2d at 1288. Likewise, any statement made by Drogoul after the guilty plea would, theoretically, be admissible against him.

In this case, however, the plea agreement governs the admissibility of the debriefing statements in the government's case-in-chief, not Rule 11(e)(6). By the terms of the plea agreement, the government agreed not to use the statements in its case-in-chief. Otherwise, the plea agreement is clear that there can be "unrestricted use" of the statements by both parties. This clearly includes the impeachment of Drogoul by prior inconsistent statement if he chooses to testify at trial. See Rule 613, Fed. R. Evid.

Similarly, the "Origins of BNL" and Drogoul's sentencing hearing testimony are outside the scope of Rule 11(e)(6) because they were not in the course of proceedings under Rule 11 nor in the

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[15] Accord United States v. Wood, 879 F.2d 927 (D.C. Cir. 1989)(statements made during plea negotiation "proffer" by defendant, where no guilty plea actually entered, found inadmissible to impeach defendant's testimony at trial); United States v. Lawson, 683 F.2d 688 (2d Cir. 1982)(defendant's suggested deal to government agent including guilty plea and testimony in exchange for concurrent sentence found inadmissible to impeach defendant). In these cases no substantive debriefing of the defendant occurred after the plea agreement, if any, was reached.

course of plea negotiations.[16] The plea agreement is silent as to sentencing hearing testimony. Therefore, this testimony will be admissible either as substantive evidence in the government's case-in-chief or to impeach Drogoul if he chooses to testify.

CONCLUSION

Based on the foregoing discussion, the government submits that all of Drogoul's 1989 statements are properly admissible during the government's case-in-chief. These statements were not the product of plea negotiations but were the result of a deliberate, calculated defense strategy unrelated to any plea discussions.

Plea negotiations began in May 1992. The government will not offer the plea negotiation proffer or the guilty plea colloquy because they are excluded by Rule 11(e)(6) and may not be used for any purpose. Drogoul's post-plea debriefing statements to government agents are covered by the plea agreement which provides unrestricted use of the statements, except that the government agreed not to use them in its case-in-chief. They may, however, be used for any other purpose including impeachment of the defendant if he chooses to testify at trial. All other statements by Drogoul, made after his plea of guilty, including the "Origins of

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[16] Accord United States v. Davis, 617 U.S. 677 (D.C. Cir. 1979)(grand jury testimony after reaching plea agreement but before entry of plea found admissible); United States v. Sterling, 571 F.2d 708 (2d Cir.), cert. denied, 439 U.S. 824 (1978)(grand jury testimony not made "in connection with" plea negotiations within meaning of Rule 11(e)(6)).

BNL," sentencing hearing testimony and statements to the news media, are fully admissible for any purpose.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

This is to certify that I have this date served upon the person(s) listed below a copy of the foregoing document either by hand delivery, by facsimile, or by placing the same in a franked envelope requiring no postage for delivery and addressed as follows:

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This 15th day of July, 1993.

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